

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

DANNY E. BEAUCLAIR,

Plaintiff,

V.

**JO ANNE B. BARNHART,
COMMISSIONER OF SOCIAL SECURITY,**

Defendant.

CIVIL ACTION

No. 05-3224-CM

ORDER

This social security appeal is before the court on the magistrate judge’s Report and Recommendation to reverse and remand the Commissioner’s denial of benefits. Both plaintiff, who proceeds *pro se*, and defendant timely objected to the Report and Recommendation (Doc. 24). The facts and law are accurately set forth in the Report and Recommendation, and the court will not repeat them here. In reviewing a magistrate judge’s Report and Recommendation, the district court makes a “*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1)(C). In its review, the court must “consider relevant evidence of record and not merely review the magistrate judge’s recommendation.” *In re Padilla*, 64 F.3d 580, 584 (10th Cir. 1995). The court has reviewed the record in accordance with this standard, and overrules both plaintiff’s and defendant’s objections.

I. Plaintiff's Objections

Plaintiff makes numerous objections to the magistrate judge's findings, most of which are conclusory. Nevertheless, because plaintiff proceeds *pro se*, the court construes his pleadings liberally. *See Hill v. Oklahoma*, 18 Fed. Appx. 769, 769 (10th Cir. 2001) (quoting *Hall v. Bellmon*,

935 F.2d 1106, 1110 (10th Cir. 1991)). The court will address each of plaintiff's objections individually.

A. New Evidence

Plaintiff argues that new evidence shows that he is disabled. Significantly, plaintiff does not specify how his new evidence supports this conclusion. After reviewing plaintiff's new evidence and reviewing the standards for submission of new evidence, *see Heimerman v. Chater*, 939 F. Supp. 832, 833-34 (D. Kan. 1996) (citations omitted), the court agrees with the magistrate judge's findings that (1) plaintiff's new evidence is not "new" or material, and (2) plaintiff did not show good cause for his failure to obtain and present this evidence prior to this stage in the proceedings. Plaintiff's objection is overruled.¹

B. Severity of Symptoms

Plaintiff contends that the severity of his symptoms, taken as a whole, show that he is disabled. Again, plaintiff did not elaborate on this broad argument, or articulate which specific findings he opposes. The court views this as a dual argument: plaintiff opposes findings regarding (1) his impairments and (2) his credibility. The court notes that the magistrate judge found error requiring remand in both of these areas of analysis.

1. Findings Regarding Plaintiff's Impairments

With respect to plaintiff's impairments, the magistrate judge found that the ALJ erred in not discussing plaintiff's diagnosis of irritable bowel syndrome ("IBS") when determining whether

¹ Similarly, plaintiff also argues that, due to the fact that he is in prison, he was unable to get many of his medical records in a timely manner. The court is unsure which medical records plaintiff is referring to. As discussed above, the court finds that the magistrate judge thoroughly analyzed plaintiff's new evidence and adopts the findings of the magistrate judge.

plaintiff's impairments are "severe" in step two of the sequential evaluation process. *See* 20 C.F.R. § 404.1521; *Hinkle v. Apfel*, 132 F.3d 1349, 1452 (10th Cir. 1997). In other words, the magistrate judge ruled in plaintiff's favor on this issue. Plaintiff's objection is therefore moot with respect to IBS. After reviewing the record and the applicable standards, however, the court finds that substantial evidence in the record supports the magistrate judge's findings that plaintiff's other alleged impairments—herniated nucleus pulposus and myofascial pain syndrome—are not "severe." The court overrules plaintiff's objection as to this argument.

2. Findings Regarding Plaintiff's Credibility

With respect to plaintiff's credibility, the magistrate judge found that one reason relied on by the ALJ in finding that plaintiff is not credible—that plaintiff demonstrates an inadequate number of "trigger points"—is not supported by substantial evidence in the record. Therefore, with regard to this finding, plaintiff's objection is moot. But the magistrate judge also found that the ALJ properly supported his finding that plaintiff is not credible with additional findings and evidence, including:

- (1) plaintiff's spotty earnings record; (2) plaintiff's activities of daily living before his incarceration are not commensurate with disability; (3) the record shows his depression and anxiety were due in large part to the fact he was facing imprisonment; (4) he was noted as hypochondriacal; . . . (6) his x-rays were generally negative; (7) he was taking no medication for his medical condition at the time of the hearing; and (8) the objective medical records do not support the extent of symptoms alleged.

Report and Recommendation (Doc. 24), at 33.

Plaintiff also argues that the ALJ did not address the fact that while he was self-employed from 1991 through 2000, plaintiff never worked a forty-hour work week. Therefore, plaintiff contends that he cannot "fulfill the requirements for 'engaging in substantial gainful activity for a continuous period of at least [sic] twelve months.'" Plaintiff is mistaken about the requirements for

disability benefits. Moreover, the fact that plaintiff did not work full-time does not indicate that plaintiff was unable to work full-time.

Also pertinent to the court's credibility determination is plaintiff's argument that the court must have confused plaintiff's income figures for plaintiff's net income (as opposed to gross income) for the years in which plaintiff was self-employed, because, plaintiff contends, his gross income in 1999 was \$50,000 and similar in previous years. The court believes that plaintiff is opposing the ALJ's and magistrate judge's "spotty income figures" finding. But this argument further weakens plaintiff's credibility. On April 13, 2000, plaintiff signed his application for disability insurance benefits and affirmed that it was true. *See* R. at 59-61. Within that application is plaintiff's statement that his "earnings record is correct as posted." *Id.* at 60. Plaintiff's earnings record, dated March 15, 2003, includes plaintiff's total yearly incomes as follows:

<u>Year</u>	<u>Total Yearly Income</u>
1990	\$6,664.02
1991	\$12,004.07
1992	\$2,006.10
1993	\$5,291
1994	\$8,787
1995	\$4,852
1996	\$4,052
1997	\$4,853
1998	\$942
1999	\$17,017

Id. at 66. Plaintiff's allegation that he earned \$50,000 gross income in 1999 is either disingenuous, or an admission that his disability application earnings figures are inaccurate.

The court has reviewed each of the reasons the ALJ relied on in finding that plaintiff is not credible, and has also reviewed the applicable standards. In so doing, the court finds that there is substantial evidence in the record to support the ALJ's finding that plaintiff is not credible.

Plaintiff's objection on this point is overruled.

C. CUNA Disability Documentation

Plaintiff contends that the CUNA Medical Group disability documentation demonstrates that plaintiff is disabled and unable to return to work. The magistrate judge, however, found that "[t]he CUNA disability documentation merely states the conclusory opinion that plaintiff is 'disabled' and has not been released to return to work. The documentation does not provide any medical evidence upon which the conclusion is based and, therefore, would not change the Commissioner's opinion." Report and Recommendation (Doc. 24), at 10-11 (citation omitted). After reviewing the record and the applicable standards, the court agrees. Plaintiff's objection is overruled.

D. Discussion of Line-Striper Job Duties

Plaintiff argues the magistrate judge erred when he failed to discuss the actual job duties required of plaintiff's former job as a line-striper. Plaintiff later adds that his work as a line-striper was sedentary work. But the ALJ found, and the magistrate judge did not dispute, that plaintiff is incapable of performing his previous work as a line-striper. Plaintiff's argument is misplaced.

E. Fibromyalgia Finding

Plaintiff seems to oppose the ALJ's findings regarding plaintiff's fibromyalgia. Plaintiff states that since the ALJ found that plaintiff suffers from fibromyalgia, "then they must take what [fibromyalgia] really is dealing with[:] the [central nervous system] and amplified pain, and its other symptoms that can be severe." Doc. 25, at 3. As an example, plaintiff points to the interaction between his fibromyalgia and his alleged herniated nucleus pulposus. The court's response to this

argument is three-fold. First, the pain associated with plaintiff's fibromyalgia is largely subjective, and this court has found that plaintiff's claims of disability are not credible. Second, in support of his argument, plaintiff points only to medical literature; plaintiff does not offer any medical source opinions demonstrating the effect of these conditions on plaintiff. With regard to the large quantity of general medical literature submitted by plaintiff, the magistrate judge held:

the general information proffered is not material to the decision because it does not present a reasonable possibility of changing the decision. That information does not relate to plaintiff's condition individually, and is merely general medical information regarding plaintiff's impairments. The court finds that the evidence proffered with plaintiff's briefs does not meet the criteria to justify remand, and may not be considered by the court in its review of the final decision of the Commissioner.

Report and Recommendation (Doc. 24), at 13. The court agrees, and adopts the magistrate judge's opinion regarding plaintiff's general medical literature. Third, the court agrees with the magistrate judge's finding that plaintiff's alleged herniated nucleus pulposus is not an impairment.

Specifically, the magistrate judge rejected plaintiff's evidence in support of his alleged herniated nucleus pulposus diagnosis—a July 19, 1994 MRI which concluded that plaintiff had a “Small central HNP L4-5 level,” (R., at 597)—because “plaintiff worked for at least five years after the diagnosis at issue, and plaintiff points to no evidence of worsening of this condition. Therefore, the evidence does not establish that this condition is disabling.” Report and Recommendation (Doc. 24), at 25. The court finds that there is substantial evidence in the record to support this finding, and overrules plaintiff's objection on this point.

F. Plaintiff's Ability to Work

Plaintiff asserts that the ALJ never addressed plaintiff's contention that “there was [sic] weeks I could only leave home to work for just a few times, and even those times was [sic] only for

a few hours, and some times [sic] not that long.” Doc. 25, at 3. Plaintiff points to Dr. Franz’s August 18, 2003 letter in support of this argument. But the magistrate judge thoroughly analyzed Dr. Franz’s letter and found that Dr. Franz opined that plaintiff was unable to work at his previous line-striping business, but did not state that plaintiff could not do any work. After reviewing the letter and the applicable standards, the court adopts the magistrate judge’s findings on this issue. Plaintiff’s objection on this point is overruled.

G. Plaintiff’s Trigger Points for Myofascial Pain Syndrome

Finally, plaintiff argues that the court found that “plaintiff didnot [sic] have Trigger points for having [myofascial pain syndrome]” and points to a medical record from Dr. Franz, which plaintiff contends states that trigger points in his feet indicate plaintiff has myofascial pain syndrome, not fibromyalgia. The court also rejects this argument for several reasons. First, after reviewing Dr. Franz’s medical record, the court is unconvinced that Dr. Franz diagnosed plaintiff with myofascial pain syndrome. Second, the medical records were written on May 24, May 31 and June 14, 1989—over ten years prior to the date on which plaintiff alleges he became disabled. Third, the record is replete with records from Dr. Franz, none of which indicate that plaintiff suffers from myofascial pain syndrome. Fourth, the magistrate judge found, and this court has concurred, that plaintiff’s allegations of disabling symptoms are not credible. After reviewing the magistrate judge’s analysis, the record, and the applicable standards, the court finds that there is substantial evidence in the record to support the magistrate judge’s conclusion. Plaintiff’s objection is overruled.

II. Defendant’s Objections

Defendant objects to both of the magistrate judge’s bases for remanding the case. First, defendant argues that although the ALJ did not discuss whether plaintiff’s IBS was a severe

impairment, this was not error because (1) there is no evidence that plaintiff's IBS was severe, and (2) none of plaintiff's doctors found that plaintiff was limited by his IBS condition. Defendant cites a Sixth Circuit case for the proposition that a non-severe finding such as this one is harmless if other severe impairments are found. *See Maziarz v. Sec'y of Health & Human Servs.*, 837 F.2d 240, 244 (6th Cir. 1987). As the magistrate judge pointed out, however, this court may "neither reweigh the evidence nor substitute [its] judgment for that of the agency." Report and Recommendation (Doc. 24), at 4 (quoting *White v. Barnhart*, 287 F.3d 903, 905 (10th Cir. 2001) (quoting *Casias v. Sec'y of Health & Human Serv.*, 933 F.2d 799, 800 (10th Cir. 1991))). The court will not decide whether plaintiff's IBS is a severe impairment or how plaintiff's IBS affects his residual functional capacity assessment; that decision rests with the Commissioner. Defendant's first objection is overruled.

Defendant also argues that the magistrate judge erred in recommending remand on the issue of plaintiff's trigger points because it is irrelevant whether plaintiff has four or eight trigger points when a definite diagnosis of fibromyalgia requires a minimum of eleven trigger points. The magistrate judge based his reasoning on the fact that,

[e]leven positive "tender points" out of eighteen fixed locations on the body are generally considered necessary to a definitive diagnosis of fibromyalgia. *Sarchet v. Chater*, 78 F.3d 305, 306 (7th Cir. 1996). As the ALJ noted, four positive "tender points" would support a finding of a "minimal number of positive 'tender points.'" It is less clear that eight positive "tender points" would be a "minimal" number compared to the eleven positive "tender points" necessary. Because the ALJ considered but one-half of the "tender points" found by Dr. Perkins, the court is unable to know whether the ALJ would find a minimal number of "tender points" if he were aware of the correct number.

Report and Recommendation (Doc. 24), at 37. Because the court is unsure of the weight the ALJ would give the correct information on review, defendant's second objection is overruled.

IT IS THEREFORE ORDERED that plaintiff's Objection/Appeal to Courts [sic] "Report and Recommendation" (Doc. 25) and Objection of Jo Anne B. Barnhart, Commissioner of Social Security, Under Fed.R.Civ.P. 72 to March 17, 2006 "Report and Recommendation" (Doc. 26) are overruled. In accordance with the magistrate judge's Report and Recommendation, the decision of the ALJ is reversed and the case is remanded for further proceedings pursuant to the fourth sentence of 42 U.S.C. § 405(g).

Dated this 20th day of September 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge